IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1504

BENNO P. LUDWIG, AS ADMINISTRATOR OF THE ESTATE OF DEAN E. CANE, DECEASED,

Respondent,

vs

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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OPINIONS BELOW.

The Opinions Below, Jurisdiction, and Statutes and Rules Involved are as stated in the Petition.

QUESTIONS PRESENTED FOR REVIEW.

1. Under the insured's life insurance policy, was the insured's death "the result of an injury sustained while the insured was a passenger in or upon a public conveyance then being operated by a common carrier to transport passengers for hire".

2. Was the law of Michigan, rather than Illinois, properly applied in construing the insured's life insurance policy.

STATEMENT OF THE CASE.

The facts and proceedings below are fully and fairly summarized in the opinion of the Court of Appeals appended to the Petition at pages A.3-A.12 and reported at 524 F. 2d 376.

REASONS WHY THE WRIT SHOULD BE DENIED.

I.

The Case Presents No Special or Important Questions.

The federal jurisdictional basis of this case is diversity of citizenship. The basic issue is whether under Michigan law the insured, Dean E. Cane, was covered at the time of his death by a clause in his life insurance policy which provided for double accidental death benefits if his death was the result "of an injury sustained while the insured was a passenger in or upon a public conveyance then being operated by a common carrier to transport passengers for hire." Relying on *Quinn* v. *New York Life Ins. Co.*, 224 Mich. 641, 195 N. W. 427 (Mich. S. Ct. 1923), the Seventh Circuit held that under Michigan law Dean E. Cane could be covered by the clause even though he was not physically riding within a vehicle at the time he was killed.

There is no decision of any other Court of Appeals which conflicts with the Seventh Circuit's application of Michigan law in the instant case. Therefore, review by this Court is not necessary to maintain uniformity among the circuits.

The lack of importance of the issue and the unlikelihood that it will come up again is demonstrated by the paucity of relevant cases discussing the issue. The decision in this case applied Michigan law only and did not purport to determine the rules applicable in any other state. Furthermore, it only applied Michigan law in an effort to construe one clause of a particular life insurance policy. Because of vital differences in wording, the Seventh Circuit's holding would not even necessarily be

applicable to similar clauses in other insurance policies. The Seventh Circuit, the trial court and counsel have been able to locate only one case in the history of Michigan jurisprudence interpreting this particular type of insurance clause. If would also appear that the issue has not arisen any more often, if at all, in other states.

The Petitioner has also belatedly raised the issue of whether the lower court correctly applied the Illinois conflict of laws rule regarding the applicable state law in construing insurance contracts. This issue was not even mentioned in Petitioner's petition to the Seventh Circuit for a rehearing *en banc*. There appear to be only two decisions in Illinois relevant to this issue and, as will be shown, they conclusively support the lower court's holding that the Illinois conflict of laws rule requires the application of Michigan law. Furthermore, all the judges involved in this case have agreed that Michigan law must be looked to in interpreting the insurance policy at issue. Even the dissenting judge in the Seventh Circuit, upon whom Petitioner relies heavily, stated that he agrees "with the majority opinion that the law of Michigan controls in the present case. . . ." (A.12).

The salutary policy behind Rule 19 of the Rules of the Supreme Court of the United States setting forth the considerations under which this Court will grant review on a writ was to preclude review in cases such as the instant one which involves the application of one state's rules of construction to an unusual and non-uniform insurance provision which has required judicial interpretation less than once every fifty years. In fact, even the Seventh Circuit with Justice Stevens participating as Circuit Justice did not deem the case of sufficient importance to warrant a rehearing *en banc* and accordingly denied the Petitioner's petition for such a rehearing. *See* A.1-A.2. On the basis of the criteria set forth in Rule 19, Respondent submits that the valuable resources of this Court should not be further consumed by this kind of case with so little precedential value.

II.

The Seventh Circuit Properly Held That Under the Insurance Policy the Insured Was Killed While He Was a Passenger in or Upon a Public Conveyance.

In construing the insurance clause at issue here, the Seventh Circuit correctly applied Michigan law as set forth in *Quinn* v. *New York Life Ins. Co., supra.*

In *Quinn* the Michigan Supreme Court interpreted an insurance policy phrase virtually identical to the provision in the instant case and made the following significant holdings:

1. The insured need not be physically riding on a vehicle to be covered by the type of insurance provision at issue here;

2. Michigan courts will resort to the law of carrier-passenger to determine whether the insured was a passenger on a public conveyance under an insurance policy. The *Quinn* court stated the following:

> ". . . [W]e are unable to see why any distinction should be made between the insurance company as a defendant and the streetcar company. At the time the provision, '*while traveling as a passenger on a streetcar,*' etc., was adopted by defendant and made a part of its contract, that phrase had well-understood meaning in the law, and it is reasonable to suppose that the meaning given to it by the courts was well understood and considered by defendant before making it a part of its double liability, and it was well known by both parties when the contract was made that, should the parties afterwards disagree upon the question of liability, *the courts would probably give the language the same construction they had given it in cases where transportation companies were defendants.*" [Emphasis added.] 195 N. W. at 428.

The Seventh Circuit in the instant case did nothing more than recognize and apply the rule of law set forth in *Quinn* that carrier-passenger law is to be applied in Michigan in determining whether the insured was a "passenger in or upon a public conveyance" under an insurance policy. Looking to Michigan carrier-passenger law, the Seventh Circuit then determined under the rule of *Rice* v. *Michigan Ry. Co.*, 175 N. W. 454 (Mich. S. Ct. 1919) that Dean Cane was such a passenger and therefore covered by the insurance provision. Clearly, the Seventh Circuit correctly applied Michigan law to this case.

III.

Massachusetts Mutual's Petition Incorrectly Distinguishes Michigan Law.

Petitioner disregards the clearly stated rule of law in *Quinn* that Michigan courts will apply carrier-passenger law in construing the language of insurance provisions like the one at issue in this case. Instead, Petitioner relies on the dissenting opinion in the Seventh Circuit which not only also failed to apply the rule enunciated in *Quinn*, but apparently rejected the rule at page A.15 where Circuit Judge Pell stated that he failed to discern why carrier-passenger law "would be 'supposed' to have been carried over into contract law". This case should not be an occasion to second guess the Michigan Supreme Court. Even if one could not discern why such a supposition was made in *Quinn* in 1923, it has been clear ever since then that such a supposition would be made in the future.

The Michigan rule that carrier law would be applied was set forth approximately 50 years before the insurance policy in this case was executed and must consequently be regarded as a part of the policy. If Petitioner was dissatisfied with the result reached in *Quinn* in 1923, it could have clearly written its policies thereafter to specifically exclude the coverage affirmed in *Quinn*. By using language in 1970 that is almost identical to the language in the *Quinn* policy, the only fair conclusion is that Petitioner intended the rule of *Quinn* to be a part of and to apply to the policies executed in Michigan.

The rationale espoused by the dissenting opinion and Petitioner amounts to the same rationale of the out-of-state cases which were specifically noted and rejected by the *Quinn* court. To reach any decision other than that reached by the Seventh Circuit would be to disregard the applicable law of Michigan.

IV.

Ambiguous Language in an Insurance Contract Must Be Construed Against the Drafter and to Support the Claim of the Insured.

When the language of an insurance policy is susceptible to two meanings, the one most favorable to the insured must be used. *London Guarantee & Accident Co.* v. *Ladd; Preferred Acc. Ins. Co. of New York* v. *Same*, 299 F. 562 (6th Cir., 1924). The fact that the Seventh Circuit held that the insurance provision covers the insured is the best possible evidence that the insurance policy did not clearly and unambiguously exclude coverage in this case. Even if one did not like the Seventh Circuit's, or the *Quinn* court's, interpretation of the clause at issue, it is at least clear that the clause is susceptible to an interpretation favorable to the insured. In light of the Seventh Circuit's decision and applying the well-known principal that ambiguity is to be construed against the insurer, the result that the insured was covered by the insurance policy is inescapable.

V.

The Seventh Circuit Correctly Applied the Law of Michigan, Rather Than the Law of Illinois.

In diversity of citizenship cases, the federal courts, when deciding questions of conflict of laws, must follow the rules prevailing in the states in which they sit. *Klaxon Co.* v. *Stentor Electric Manufacturing Co., Inc.*, 313 U. S. 487 (1941). Therefore, in this case one must look to the Illinois conflict of

laws rules to determine which state's laws to apply in interpreting the insurance policy in question.

The Illinois conflict of laws rule regarding the proper law governing the validity and effect of insurance contracts was stated in *Gray* v. *Penn Mutual Life Insurance Co. of Phila.*, 5 Ill. App. 2d 541, 126 N. E. 2d 409 (1955). There the court, citing *Hartliep Transit Co.* v. *Central Mut. Ins. Co.*, 288 Ill. App. 140, 5 N. E. 2d 879 (1936), held that the construction of insurance contracts is governed by the law of the place where the contract was made. The court stated the following at 413:

> "The general rule is that *a contract of insurance is deemed to be executed at the place where the last act is done which is necessary to make the same binding upon the parties*, and if the policy does not become binding until * * * delivery to the assured, the place of delivery is considered the place of the contract. (Authorities cited) Another general rule in the construction of contracts in matters affecting their validity and the rights of the parties is that *they are governed by the law of the place where the contract is made, at the time of the making thereof, and that such law is as much a part of the contract as if incorporated therein.* This rule prevails in the absence of any agreement of the parties to the contrary. Gaston, Williams & Wigmore of Canada v. Warner, 260 U.S. 201, 43 S.Ct. 18, 67 L.Ed 210, 211." [Emphasis added.]

There is no dispute in this case that the last acts necessary to make the policy binding on the parties were performed in Michigan, and that the contract was therefore made in Michigan. However, Petitioner ignores *Gray* and *Hartliep*, although they are precisely in point, and urges this Court to adopt the "most significant contracts" rule in the instant case. Citing *P. S. & E., Inc.* v. *Selastomer Detroit, Inc.*, 470 F. 2d 125 (7th Cir., 1972), Petitioner argues that the conflicts rule for tort cases should be applied to contract cases. However, *P. S. & E.* involved a "multi-faceted situation" in which the court specifically noted that there appeared "to be no Illinois authority which would clearly

govern." Since there is clear Illinois authority governing the instant case, the traditional "place of making" test must be applied. In fact, the author of the *P. S. & E.* decision, Circuit Judge Sprecher, joined in the majority opinion in this case which stated that the "District Court aptly distinguished the facts in *P. S. & E.* from those of this case . . . and rightfully, we believe, concluded *P. S. & E.* to be inapposite" (A.6 n. 1).[1]

Petitioner also relies on several other cases involving either torts, situations in which there was no previous Illinois authority governing the factual situation, or conflict rules of other states. Like *P. S. & E.*, however, these cases are inapposite since there is clear Illinois authority, which Petitioner has

1. Because Petitioner did not cross-appeal, the Seventh Circuit did not technically decide the conflicts issues. However, in a footnote at A.6, the Seventh Circuit clearly indicated that it had considered Petitioner's conflicts argument and that it did not agree with it. The Seventh Circuit noted that the district court had "fully considered" Petitioner's contention, had "flatly rejected it", and had aptly distinguished the facts of the authority cited by Petitioner from those of the instant case which "conclusively establish the place of making the policy". Finally, even the dissenting opinion agreed with "the majority opinion that the law of Michigan controls the present case" (A.12).

Notwithstanding the Seventh Circuit's indication of approval of the district court's resolution of the conflicts issue, Petitioner complains that the Seventh Circuit refused to specifically rule on the issue because of the absence of a cross-appeal. However, the rule is that "a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party". *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435 (1924). Petitioner desires to apply the law of a different state with a view to providing itself with rights that may exist in that state, but which do not exist in the state whose law the trial court chose to apply. Furthermore, even if further review of the conflicts issue were appropriate, which it is not, the proper procedure would not be for this Court to review the entire case, but to remand the case to the Seventh Circuit for a consideration of the conflicts issue. *See Dandridge* v. *Williams*, 397 U. S. 471, 475-476 n. 6 (1970). However, in light of the failure of Petitioner to cross-appeal the issue, the manifest correctness of the trial court's determination of the issue, and the clear approval thereof by the Seventh Circuit, any further consideration of this issue would be fruitless and inappropriate.

not contradicted, which holds that the "place of making" test is to be applied in Illinois in determining which state law should be utilized in construing life insurance policies.

CONCLUSION.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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